Supreme Court, U. S.
FILED
MAR 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-762

COMMONWEALTH EDISON COMPANY, *et al.*, *Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

and

THE STATE OF NEW YORK, *Respondents*.

PETITIONERS' REPLY BRIEF

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From the mistaken premise that the mixed oxide fuel cycle represents a wholly new technology, the Respondents reason that *Kleppe* v. *Sierra Club,* 96 S.Ct. 2718 (1976), is distinguishable on the theory that the asserted novelty of the technology renders it impossible to study, on an individual basis, the environmental effects of licensing actions relating to this fuel cycle. This distinction has no support in the

Kleppe decision or in the language of the National Environmental Policy Act of 1969, and as indicated in our Petition, pp. 13-14, the premise upon which it is based is false.

But even if there were some merit to the "new technology" contention, the point would remain the same—indeed, it would be even stronger—that the proper body to decide in the first instance whether an individual action in the fuel cycle is susceptible to evaluation in accordance with NEPA is the expert agency created by Congress, and not the courts. Hence, even if the Respondents' unfounded premise were to be accepted, the interim licensing criteria should stand. There would still be an opportunity for the courts, in any appropriate judicial review of the record of a licensing proceeding, to determine whether as applied to the particular case the requirements of NEPA had been met.

In addition to asking the Court to indulge in impermissible presumptions as to the future conduct of the NRC and to substitute its judgment for that of the NRC Commissioners, the Respondents invite the Court to pit the NRC's Notice and the Government's Memorandum against other official and unofficial expressions of Executive policy on energy.* Such references miss the mark,

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* Thus, NRDC's Brief in Opposition, at page 23 n.12, refers to remarks made by President Carter in San Diego during the 1976 campaign. Inexplicably, NRDC argues that "[t]he decision of the Court of Appeals implements that policy," even though this case was decided by the Second Circuit *before* the San Diego statement. For its part, New York refers variously to an October 28, 1976 statement by then President Ford, the new Administration's budget request for the Liquid Metal Fast Breeder Reactor, and a February 22, 1977 "information release" of the Energy Research and Development Administration. N.Y. Brief in Opposition at 6-7.

for the decision of the Second Circuit must stand or fall in light of the governing statute—NEPA—and not on the basis of some asserted inconsistency with these diverse expressions of general policy, the authoritativeness of which is, to say the least, not uniform.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Petition, a writ of certiorari should be granted, and the decision below should be summarily reversed.

Respectfully submitted,

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